

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
(Ameritech Illinois) and)	
KBS Computer Services, Inc.)	
)	02-0676
Joint Petition for Approval of Negotiated)	
Interconnection Agreement dated)	
September 30, 2002, pursuant to)	
47 U.S.C. § 252.)	

**Ameritech Illinois Responses to
Staff Data Requests**

General Objection 1: Ameritech Illinois objects to Staff's Data Requests to the extent they ask Ameritech Illinois to describe what Staff refers to as the 11State Appendix, the Texas Remedy Plan and the 01-0120 Remedy Plan or to compare any of the foregoing or to state how any of the foregoing would operate. Staff has the 11State Appendix, the Texas Remedy Plan and the 01-0120 Remedy Plan in its possession, and each of those documents speaks for itself.

General Objection 2: Ameritech Illinois objects to Staff's Data Requests to the extent they inquire into the meaning or intent of what Staff refers to as the 11State Appendix, the Texas Remedy Plan and the 01-0120 Remedy Plan. The meaning of each of those documents is expressed on its face. Evidence of what the parties intended a provision to mean – apart from the words of the provision itself – would be relevant only if the provision were found to be ambiguous. Where the language of a written contract is unambiguous, that language is the sole determinant and the “only proper evidence” of the parties’ intent. *Kennedy, Ryan, Monigal & Assoc., Inc. v. Watkins*, 242 Ill. App. 3d 289, 295 (1st Dist. 1993). It is only where the express terms of an agreement are ambiguous that the parties’ intent can properly be determined by extrinsic evidence. *Chandler v. Maxwell Manor Nursing Home, Inc.*, 281 Ill. App. 3d 309, 322 (1st Dist. 1996). And even when a contract is ambiguous, the fact-finder looks to expressions of intent (if any) that the parties actually made to each other when they negotiated the ambiguous language and to other circumstances surrounding the creation of the contract, not to after-the fact expressions of intent by one party or the other. *E.g., Bank of Marion v. Robert ‘Chick’ Fritz, Inc.*, 9 Ill. App. 3d 102, 108 (5th Dist. 1973) (“An intention not expressed [or] not communicated . . . is inoperative and immaterial to the question of the agreement.”)

Furthermore, to the extent (if any) that the 11State Appendix or the Texas Remedy Plan or the 01-0120 Remedy may later be found to be ambiguous, it is not appropriate to be creating now, in the form of responses to Data Requests, what could later be characterized as a dispositive gloss on the language on which the parties have agreed. In

short, the documents say what they say, and they have whatever negotiation history they have, and it would be neither useful to this proceeding nor appropriate in light of possible future disagreements for Ameritech Illinois to articulate a view of what the documents mean.¹

¹ By asserting this objection, Ameritech Illinois of course does not waive its right to disagree with Staff's interpretation of any provision in the subject documents on the ground that it is inconsistent with the unambiguous meaning of the provision.

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 1.0**

Request:

The Negotiated Agreement herein contains an Appendix, titled Appendix Performance Measurements-SBC-11State (11State Appendix), which consists of 13 pages. In Ill.C.C. Docket 98-0555, the SBC-Ameritech Merger Order, a performance assurance plan was put into effect on an interim basis (The Texas Remedy Plan). In Ill.C.C. Docket No. 01-0120, which dealt with Condition 30 of the SBC-Ameritech merger, the final plan established by the Commission (The 01-0120 Remedy Plan). In addition, pursuant to Condition 30, Ameritech, the CLECs, and Staff have jointly reviewed and amended the performance measurements on a collaborative basis every 6 months.

- a. How do the performance measurements in the 11State Appendix differ from the performance measurements in The Texas Remedy Plan?
- b. How do the performance measurements in the 11State Appendix differ from the performance measurements in The 01-0120 Remedy Plan?
- c. How do the performance measurements in the 11State Appendix differ from the performance measurements established in the most recent review?

Response:

Ameritech Illinois objects to Staff Data Request 1.0 on the grounds set forth in General Objection 1. Without waiving its objection, Ameritech Illinois states as follows:

The performance measurements in the 11 State Appendix are from the FCC's SBC/Ameritech Merger Order and are contained in paragraphs 23 and 24 of the FCC Merger Conditions and its associated attachments. The plan consists of 20 performance measurement categories (with sub-measurements). The measurements are:

- % FOC Received within "X" Hours
- Average Response Time for OSS Pre-Order Interfaces
- Order Process Percent Flow Through
- % SBC Caused Missed Due Dates
- % Mechanized Completions Returned within One Day of Work Completion
- % Trouble Reports Within 10 Days of Installation
- Mean Installation Intervals
- Average Installation Interval
- Average Delay Days for SWBT Caused Missed Due Dates
- Average Installation Interval – DSL
- Average Response Time for Loop Qualification Information
- % Missed Repair Commitments
- % Repeat Reports

Receipt to Clear Duration
Mean Time to Restore
Trouble Report Rate
Average Trunk Restoration Interval for Service Affecting Trunk Groups
% Trunk Blockage
CHC/FDT LNP with Loop Provisioning Intervals
% Missed Collocation Due Dates
Billing Timeliness
OSS Interface Availability
Common Transport Trunk Blockage

These performance measurements are a subset of the performance measurements found in the Texas Performance Plan. The Texas Performance Plan was also the starting basis for the performance measurements in the 01-0120 Performance Plan.

Illinois Commerce Commission
Docket 02-0676
Staff Data Request 2.0

Request:

Section 15.1 of the underlying negotiated agreement provides that the monetary payments for failure to meet specified performance standards are the sole obligation of Ameritech to pay damages or financial penalties for failure to meet specified performance standards identified in 11State Appendix. Section 2.1 of the 11State Appendix provides that liquidated damages shall be the sole and exclusive remedy for Ameritech's failure to meet specified performance measures and shall be in lieu of any other damages CLEC might otherwise seek for such breach through any claim or suit brought under any contract or tariff.

Section 5.1(d) of the 11State Appendix provides that the liquidated damages herein provided will constitute full compensation for any failure of SBC to meet a specified performance commitment in this Attachment and any specific time commitments for the same activity contained in any other Attachments or Appendices.

- a. How do Section 15.1 of the underlying negotiated agreement and Sections 2.1 and 5.1 of the 11State Appendix relate to the creation of an Illinois remedy plan, *e.g.*, The Texas Remedy Plan or The 01-0120 Remedy Plan? For example, was it the parties' intent to preempt any application of an Illinois remedy plan between themselves, or was it the parties' intent to treat an Illinois remedy plan as an addition to or a substitution for the 11 State Appendix?
- b. Assuming the underlying negotiated agreement with its 11State Appendix is approved, does the creation of an Illinois remedy plan through the various dockets now pending before the Illinois Commerce Commission in which creation of an Illinois remedy plan is being considered constitute an intervening law change pursuant to Section 21.1 of the underlying negotiated agreement immediately invalidating or modifying the 11State Appendix or Section 15.1 of the underlying negotiated agreement or both?
- c. Section 13.1 of the Appendix provides that the liquidated damages under this Appendix does not apply to performance measurements ordered by state commissions. Does this provision mean that the remedies of an Illinois remedy plan are unaffected by this agreement of the parties and are applicable to the parties to this Agreement in addition to the remedies provided in the agreement? Alternatively, does this provision mean that the performance measures that are the subject to this Appendix supplant the Illinois Commission's performance measures for purposes of determining remedies?

Response:

Ameritech Illinois objects to Staff Data Request 2.0 on the grounds set forth in General Objections 1 and 2. Without waiving its objection, Ameritech Illinois states as follows:

- a. Ameritech Illinois is without knowledge or information sufficient to form a belief as to the intent of KBS Computer Services with respect to the matters that are the subject of Data Request 2.0(a). The 11 State Remedy Plan is one remedy plan Ameritech makes available to CLECs. It provides a consistent plan across 11 SBC states, and many CLECs choose it, presumably for that reason. It stands alone and does not by its terms displace or supplement any other plan.
- b. Ameritech Illinois objects to Staff Data Request 2.0(b) on the additional ground that it improperly asks Ameritech Illinois for a legal opinion. Ameritech Illinois is no better situated than Staff to read Section 21.1 of the underlying negotiated agreement and to opine on whether the facts referenced by Staff do or do not constitute an intervening law change under that provision.
- c. See response to a above.

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 3.0**

Request:

Section 10.6 of the Appendix provides that the maximum liquidated damages to all CLECs in Illinois shall not be in excess of \$.51 Million per month. Assuming the aggregate liquidated damages of all Illinois CLECs in a particular month is greater than \$.51Million, how do the payments get distributed to all the CLECs?

Response:

If the aggregate liquidated damages of all Illinois CLECs with the 11 State Appendix is greater than \$.51 Million, then \$.51 Million will be distributed to those CLECs on a pro rata basis. For example, if the aggregate liquidated damages of all Illinois CLECS with the 11 State Appendix in one month were \$.6 million and \$.3 million of that amount were attributable to carrier X, carrier X would receive \$.255 million (one half of \$.51 million).

Illinois Commerce Commission
Docket 02-0676
Staff Data Request 4.0

Request:

Assume that Ameritech fails to meet the performance measurements of The 11 State Appendix in a particular month when aggregated for all Illinois CLECs

- a. but, for this individual CLEC, Ameritech met or exceeded the same performance measurements in that month. Would this individual CLEC receive a share of the liquidated damages?
- b. and Ameritech also failed to meet the performance measurements for this CLEC. Would this CLEC receive all of its liquidated damages, a prorated amount, or none of the damages while other CLECs received all or some of their damages?

Response:

Ameritech Illinois objects to Staff Data Request 4.0 on the grounds set forth in General Objections 1 and 2. Without waiving its objection, Ameritech Illinois states as follows:

The remedy plan in the 11 State Appendix does not look at aggregate CLEC results in determining payments to individual CLECs. It looks at CLEC-specific results and pays accordingly. If Ameritech failed to meet the performance measurements for a particular CLEC, Ameritech would pay the appropriate damages.

Illinois Commerce Commission
Docket 02-0676
Staff Data Request 5.0

Request:

Assume that Ameritech meets the performance measurements of The 11State Appendix in a particular month when aggregated for all Illinois CLECs but, for this individual CLEC, Ameritech significantly fails to meet the same performance measurements in that same month. Will this individual CLEC receive liquidated damages for that month?

Response:

See response to Staff data request 4.0.

Illinois Commerce Commission
Docket 02-0676
Staff Data Request 6.0

Request:

- a. Does Section 6.3 of The 11State Appendix mean that, for the first three months of this Agreement, there are no liquidated damages or other remedies for any failure by Ameritech to meet any performance measurement under the negotiated agreement?
- b. Does Section 6.3 of The 11State Appendix mean that, for the first three months of this Agreement, there are no liquidated damages or other remedies for any failure by Ameritech to meet any performance measurement arising from outside of the negotiated agreement?

Response:

Ameritech Illinois objects to Staff Data Request 6.0 on the grounds set forth in General Objections 1 and 2.

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 7.0**

Request:

Section 21.1 of this negotiated agreement ends with three sentences each providing that Ameritech does not waive any of its legal rights, etc., vis-à-vis various Court and FCC decisions. Is it intended by this language that the CLEC is waiving its legal rights, etc., in relation to these same Court and FCC decision?

Response:

Ameritech Illinois objects to Staff Data Request 7.0 on the grounds set forth in General Objection 2.

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 8.0**

Request:

Does the 01-0120 Remedy Plan serve as the basis for The 11State Appendix? If yes, then:

- a. list which provisions are the same.
- b. list which provisions of The 01-0120 Remedy Plan were modified and the correlating paragraph number in The 11State Appendix.
- c. list which provisions of The 11State Appendix are new.

Response:

Ameritech Illinois objects to Staff Data Request 8.0 on the grounds set forth in General Objection 1. Without waiving its objection, Ameritech Illinois states as follows: No.

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 9.0**

Request:

Please provide a comparison of the payments made under the remedy plan ordered in Docket 01-0120, to the payments made under the remedy plan in Appendix Performance Measurements in the Ameritech Illinois/KBS Computer Services Interconnection Agreement. When running each plan, assume all CLECs are using that remedy plan. For calculating Tier 1 estimates, use actual performance data for the three months of May through July 2002. For calculating Tier 2 estimates, use actual performance data for the appropriate months that will allow calculation of Tier 2 estimates for the three months of May through July 2002.

Provide the supporting information on a CD in an Excel spreadsheet. Provide in the following format:

	May	June	July	Totals
Tier 1				
01-0120				
SBC11State				
Tier 2				
01-0120				
SBC11State				

Response:

Ameritech Illinois objects to Staff Data Request 9.0 on the grounds set forth in General Objections 1 and 2 and on the additional ground that it would be unduly burdensome to gather the requested data, in part because the data is not readily available and programming would be required in order to generate the data. Ameritech Illinois further objects on the ground that a party cannot be required to create information in order to respond to data requests. Discovery in Illinois is limited to the obtaining of information and things that exist and that are in the possession of the party from whom discovery is sought. As the Illinois Appellate Court explained in *Mendelson v. Feingold*, 69 Ill. App. 3d 227, 232, 387 N.E.2d 363, 366 (2d Dist. 1979), 'None of the rules regulating discovery . . . authorize the court to require a party to provide a witness, furnish a document or fashion some object (none of which then exist) for the benefit of an adverse party. These rules are directed only towards the disclosure of that which does exist, for example, tangible things or knowledge possessed by persons.' See also, *In re the Interest of R.V. et al.*, 288 Ill. App. 3d 860, 870, 681 N.E.2d 660, (1st Dist. 1997) ('We know of no interpretation of Rule 201 [the principal Illinois discovery rule], and appellees have cited none, which would allow the court to require a party to create documents or records for discovery'). Without waiving its objections, Ameritech Illinois states as follows:

In general, the 11 State Remedy Plan is a Tier 1 plan only. Tier 2 payments are made under the state ordered plan in Docket 01-0120. Tier 2 payments are based on performance measurement results for all CLECs, including those who do not have a CLEC specific remedy plan appendix. Furthermore, Ameritech Illinois has voluntarily made available the 11 State Remedy Plan and payments made pursuant to such plan are a voluntary contractual undertaking between Ameritech Illinois and KBS Computer Services. On the other hand, payments made pursuant to Docket 01-0120 are solely under the compulsion of a Commission order that Ameritech Illinois believes violates state and federal law.

Illinois Commerce Commission
Docket 02-0676
Staff Data Request 10.0

Request:

Please identify all telecommunication carriers within the State of Illinois that are currently subject to the 11State or earlier 13State Remedy Plan. Please provide the Docket Numbers when such said negotiated agreements were approved by the Commission.

Response:

Ameritech Illinois objects to this request on grounds that the information requested is publicly available. Notwithstanding this objection and without waiving it, Ameritech Illinois states that it is aware that the following approved interconnection agreements contain Remedy Plan appendices more-or-less identical to the 11 State Remedy Plan Appendix at issue in this docket.

Budget Phone, 01-0800
CAT Communications, 02-0537
Easton Telecom Services, 02-0119
Equivoice, 02-0520
First Communications, 02-0386
Comm South Companies, 02-0468
Navigator Telecommunications, 02-0468
Nexus Communications, 02-0514
Truly Clear Communications, 02-0111
VarTec Telecom, 01-0821

**Illinois Commerce Commission
Docket 02-0676
Staff Data Request 11.0**

Request:

SBC-11STATE plan states that Ameritech Illinois will pay liquidated damages when it performs non-compliant performance with respect to thirty-nine performance measurements (see list below).

- a) In the August, what percentage of CLECs had more than ten (10) occurrences/measures for the performance measurements incorporated into the SBC11STATE remedy plan. State the percentage on the line next to the performance measure listed below under the "10".
- b) In the August, what percentage of CLECs had more than ten (10) occurrences/measures for the performance measurements incorporated into the SBC11STATE remedy plan. State the percentage on the line next to the performance measure listed below under the "30".

10 30

_____	_____	% FOC Received within "X" Hours
_____	_____	Average Response Time for OSS Pre-Order Interfaces
_____	_____	Order Process Percent Flow Through
_____	_____	% SBC Caused Missed Due Dates -- POTS
_____	_____	% SBC Caused Missed Due Dates -- Design
_____	_____	% SBC Caused Missed Due Dates -- UNE
_____	_____	% Mechanized Completions Returned within One Day of Work Completion
_____	_____	% Trouble Reports Within 10 Days of Installation -- POTS
_____	_____	% Installation Trouble Reports Within 30 Days of Installation -- Design
_____	_____	% Trouble Reports Within 10 Days of Installation -- UNE
_____	_____	Mean Installation Intervals -- POTS
_____	_____	Mean Installation Intervals -- Design
_____	_____	Percent Installations Completed Within "X" Days -- UNE
_____	_____	Average Installation Interval
_____	_____	Average Delay Days for SWBT Caused Missed Due Dates -- POTS
_____	_____	Average Delay Days for SWBT Caused Missed Due Dates -- Design
_____	_____	Average Delay Days for SWBT Caused Missed Due Dates -- UNE

_____	_____	Average Installation Interval – DSL
_____	_____	Average Response Time for Loop Make-Up Information
_____	_____	% Missed Repair Commitments – POTS
_____	_____	% Missed Repair Commitments -- UNE
_____	_____	% Repeat Reports – POTS
_____	_____	% Repeat Reports – UNE
_____	_____	% Repeat Reports -- Design
_____	_____	Receipt to Clear Duration – POTS
_____	_____	Receipt to Clear Duration – Design
_____	_____	Receipt to Clear Duration -- UNE
_____	_____	Mean Time to Restore – Design
_____	_____	Failure Frequency – Design
_____	_____	Mean Time to Restore – UNE
_____	_____	Trouble Report Rate – POTS
_____	_____	Trouble Report Rate – UNE
_____	_____	Average Trunk Restoration Interval for Service Affecting Trunk Groups
_____	_____	% Trunk Blockage
_____	_____	CHC/FDT LNP with Loop Provisioning Intervals
_____	_____	% Missed Collocation Due Dates
_____	_____	Billing Timeliness
_____	_____	OSS Interface Availability
_____	_____	Common Transport Trunk Blockage

Response:

Ameritech Illinois objects to this request on the ground that it is unanswerable as written, in that it contains no clear time frame and appears to require that identical information be presented in both the “10” and “30” columns. Assuming arguendo that this request contained a clear time frame, Ameritech Illinois also objects to this request on the ground that a party cannot be required to create information in order to respond to data requests. Discovery in Illinois is limited to the obtaining of information and things that exist and that are in the possession of the party from whom discovery is sought. As the Illinois Appellate Court explained in *Mendelson v. Feingold*, 69 Ill. App. 3d 227, 232, 387 N.E.2d 363, 366 (2d Dist. 1979), ‘None of the rules regulating discovery . . . authorize the

court to require a party to provide a witness, furnish a document or fashion some object (none of which then exist) for the benefit of an adverse party. These rules are directed only towards the disclosure of that which does exist, for example, tangible things or knowledge possessed by persons.' See also *In re the Interest of R.V. et al.*, 288 Ill. App. 3d 860, 870, 681 N.E.2d 660, (1st Dist. 1997) ('We know of no interpretation of Rule 201 [the principal Illinois discovery rule], and appellees have cited none, which would allow the court to require a party to create documents or records for discovery').